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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 877

EARL SERAP, RALPH ROSS and BARTON FRISBEE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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SPEAKER-HINES AND THOMAS, INC., STATE PRINTERS, LANSING, MICHIGAN — 1964

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The People of the State of Michigan, by and through their attorneys, Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, and James R. Ramsey, Assistant Attorney General, oppose the issuance of the writ of certiorari to review the judgment of the Supreme Court of Michigan.

OPINION

The opinion of the Court is as set forth in the brief of petitioner.

JURISDICTION

Respondent agrees that the Court has jurisdiction if it chooses to exercise it.

QUESTION PRESENTED

Respondent agrees that the question is as presented by petitioner.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Respondent agrees that the statutes quoted are involved, and also suggests that involved are the provisions of section 768.13, CL 1948 (§28.1036, MSA 1954 Rev), which provides as follows:

> "Any person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily twenty of the persons drawn to serve as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily fifteen of such persons, and no more. In cases involving two or more defendants, who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily twenty persons returned as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times fifteen of the persons returned as jurors as there may be defendants being so jointly tried."

STATEMENT OF THE CASE

Respondent agrees to the statement of the case.

REASONS FOR NOT GRANTING THE WRIT.

The judgment should not be reviewed because the question raised is not substantial. The precise question involved here has never been passed upon by the Supreme Court of the United States, but other cases have been determined which point the way quite clearly and which indicate the decision that should be rendered in this precise situation.

The only question which can be raised deals with the propriety of the classification. Michigan classifications as they relate to peremptory challenges are based upon the severity of the offense charged. Where the offense charged is not punishable by death or life imprisonment, the defendant is allowed five peremptory challenges and the prosecuting officer five. If there be more than one defendant, each shall have five peremptory challenges and the prosecuting officer shall have an equal number. (CL 1948 §768.12 MSA 1954 Rev §28.1035).

If the offense charged is punishable by death or life imprisonment, the defendant shall have twenty peremptory challenges and the prosecuting officer fifteen. If there be more than one defendant, each shall have twenty peremptory challenges, with the prosecuting officer having fifteen for each defendant. (CL 1948 §768.13 MSA 1954 Rev §28.1036).

Provisions authorizing the calling of a jury consisting of fourteen persons are contained in CL 1948 §768.18 MSA

1954 Rev §28.1041. This section is quoted in the brief of appellant and consequently is not set forth in full here.

It should readily be observed that the Michigan classifications are not based on the number of jurors called. The pattern is set, rather, by the punishment that may be meted out. Thus the peremptory challenge for a jury of twelve may be twenty or five, depending upon the crime charged. Likewise, the number of challenges for a jury of fourteen may be twenty or five, depending upon the crime charged. We find no law which brands this as an improper classification.

Certainly there is no constitutional right to a certain number of peremptory challenges or, for that matter, to any peremptory challenges whatever. The constitutional right is to be tried by an impartial jury. The question of a peremptory challenge never arises until after qualified jurors are sworn. The peremptory challenge has for its object the rejection of a qualified juror and not a disqualified one. This is the rule in Michigan, as well as in other jurisdictions. See *People v. Roxborough*, 307 Mich 575, citing *United States v. Marchant & Colson*, 12 Wheat. 480.

In the case of *Hayes v. Missouri*, 120 US 68, the Court had occasion to pass upon a contention that the statute of Missouri gave more peremptory challenges to the prosecution in capital cases tried in cities of over 100,000 inhabitants than were allowed elsewhere, and held that it did not offend the Fourteenth Amendment. The Court there said:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held. • • •

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U.S. 27, 32."

In *Brown v. New Jersey*, 175 US 172, dealing with the difference in the number of peremptory challenges allowed in the case of a struck jury instead of an ordinary jury, the Court said:

"But that a state may make different arrangements for trials under different circumstances of even the same class of offenses, has been already settled by this court."

The fact that joint defendants had no more peremptory challenges than one defendant would have was considered not a violation of the Sixth Amendment in *Stilson v. United States*, 250 US 583. Also a requirement that joint defendants exercise peremptory challenges jointly was not considered a violation of the Fourteenth Amendment in *State v. Persinger* (Wash), 352 P (2) 497.

It seems to us that the Michigan statute making the classification it does, based upon the nature and degree

of the offense as defined by statute, is not offensive to the Fourteenth Amendment. Neither should it be said that when a trial is prolonged, the drawing of additional jurors without increasing the number of peremptory challenges is offensive. These are, in effect, two different classifications. One is based upon the degree of the offense; the other is based upon the time which will be consumed in trying the issues and reaching a determination. All people falling within the class are treated equally. It would seem that the instant situation is governed by *Brown v. New Jersey, supra.*

CONCLUSION

Respectfully we submit that the present controversy is well within the rules of *Hayes v. Missouri*, and *Brown v. New Jersey*, and in view thereof the petition for certiorari should be denied.

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